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U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re **Shuttsco, Inc.**

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Serial No. 74/**511,435**

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**H. Jay Spiegel of H. Jay Spiegel & Associates for Shuttsco, Inc.**

**Tomas Vlcek**, Managing Attorney, Law Office **115**

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Before Simms, Seeherman and McLeod, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Shuttsco, Inc. has applied to register the color orange, as shown below, for a "snow removal hand tool having a handle with a snow removing head at one end, the head being of a solid uninterrupted construction without prongs."<sup>1</sup> The following description of the mark is of

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<sup>1</sup> Application Serial No. 74/511435, filed April 12, 1994 and asserting first use and first use in commerce on December 3, 1979.

record: "The mark consists of the color orange as applied to the head of the goods. The dotted outline of the goods is intended to show the position of the mark and is not a part of the mark." The drawing is lined for the color orange.

A final refusal of registration has issued pursuant to Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. 1051, 1052 and 1127, on the grounds that the asserted mark is de jure functional and that, even if it were not de jure functional, applicant has not demonstrated that it has acquired distinctiveness as a trademark.<sup>2</sup>

Applicant has appealed, and the case has been fully briefed. Applicant had requested an oral hearing, but subsequently withdrew this request.

Applicant's snow removal hand tool is similar to a scraper/brush which is used to remove snow from an automobile. Although the identification is not so limited,

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<sup>2</sup> Applicant does not contend that the color orange for its snow removal hand tool is inherently distinctive, and this issue is not before us.

in fact applicant's product is made of foam so that it will not scratch a car's surface.

The Examining Attorney asserts that the color orange for applicant's snow removal hand tool is de jure functional because it is a high visibility color, and "high visibility is an important safety and utility feature of the goods." Brief, p. 4. The Examining Attorney has submitted a number of articles taken from the NEXIS data base which make reference to the visibility of the color orange. These references, however, are to the visibility of the color orange in general, rather than to orange as a color for a snow removal hand tool. For example, some of the references are to the color orange for hunting gear because it is easier to see in the woods or in the water. The Examining Attorney has made of record four articles which refer to orange in terms of visibility in snow:

Headline: Poles will help firefighters  
find hydrants buried in snow; bright  
orange marks will also help residents  
digging out from snow to find them.  
"The Morning Call," February 3, 1996

...an enormous soccer field; I watched  
two games being contested  
simultaneously, each played with a  
bright orange ball that's easier to see  
atop the snow.  
"Skiing," March 1994

Standard white golf balls were  
substituted with bright yellow, orange

and fuchsia golf balls to make them easier to see. Still, trying to find golf balls in the snow was like looking for a blind date in a crowded auditorium.

"St. Louis Post-Dispatch," January 2, 1989

The colors that make your car most visible depend upon lighting, weather and traffic conditions, according to engineers at Daimler-Benz in German. White is best in most situations. Bright yellow and orange are best in heavy snow or white sand.

"U.S. News & World Report," January 9, 1984

Although these articles show that orange is a color with high visibility in snow, in order to prove that orange is de jure functional for a snow removal hand tool the Examining Attorney must show that the color confers a competitive advantage.

The Examining Attorney asserts that the orange color is a safety feature because if the goods are stepped on while on the ground "the wooden handle would swing up rapidly, striking the person who stepped on it." Brief, p. 4. It is not clear to us that the snow removal hand tool could be stepped on in such a way that the handle would swing up as the Examining Attorney suggests. The Examining Attorney's statement brings to mind cartoon images of a character stepping on the hard edge of a rake, causing the handle to hit the character in the face. But applicant's

goods are not rakes, but a hand tool with a relatively short handle which could not fly up in such a fashion. More importantly, these goods are not the type of equipment which is typically left on the ground. Applicant's president has submitted a declaration stating that consumers typically store these snow removal tools in a closet in their home or in the trunk or back seat of their vehicle. When they desire to use the tool, they remove it from its storage area, use it on the vehicle, and then return it to its storage area.

The Examining Attorney also asserts that the high visibility of the orange color is a utility feature because it "makes the goods easier to find if laid down, particularly in a heavy snowfall, which would help prevent loss of the goods." Brief, p. 4. The Examining Attorney points to a statement made by one of applicant's customers in which, in addition to stating that "the bright orange color of the head unit on you [sic] Sno-Rake is a very important factor in the recognition of your product," added that "the bright color is also extremely helpful for gathering up and finding the Sno-Rakes after use. They definitely stand out in the snow."

Applicant, on the other hand, has explained, as indicated above, that the product is typically not placed

in the snow, but is taken from its storage space and used to remove snow from the car, and then returned to its storage space. This manner of use appears to us to be more logical for a snow removal hand tool than leaving the tool in the snow, since one assumes that not only can snow usually be removed from a car without the need to take breaks, but that one would do so because the snow removal would be preparatory to driving the car.

The fact that the orange color makes the snow removal tool easy to see does not establish that the orange color per se gives the snow removal tool greater utility. Although the Examining Attorney speculates that the color orange would make the tool easier to spot if it were dropped, it appears that, in the circumstances in which the tool is used, almost any color (except for white and perhaps some grays and beiges) would serve that function adequately.

Accordingly, based on the record before us, we find that the Office has failed to establish that the color orange is de jure functional for a snow removal hand tool. In saying this, we recognize the limited resources available to the Examining Attorney, and point out that we might come to a different conclusion in an inter partes

proceeding, where we would have the benefit of evidence from those in the trade.

The Examining Attorney has also refused registration on the ground that applicant has not shown that the color orange functions as a trademark for its goods because it has not acquired distinctiveness. As noted above, applicant has not argued that the color orange is an inherently distinctive trademark, but that it has acquired distinctiveness.

In support of its claim of acquired distinctiveness, applicant has submitted the declaration of its president, Katy Shutts, attesting to use of the mark since December 1979; sales of orange snow removal tools in the ten-year period from 1988 through 1997 amounting to over 270,000 units, with sales increasing from the 11,000 to 18,000 range in the earlier years, to the 30,000 to 47,000 range in more recent years. Advertising expenditures during this same period were in excess of \$213,000, with \$70,000 spent in 1997. The advertisements submitted by applicant do not explicitly reference the orange color of the snow removing head, but they do depict the tool in the color orange, and otherwise prominently use the color orange for graphics and text. As a result, they visually make the connection between applicant's goods and the color orange. In

addition, an advertisement by one of applicant's distributors, A-B&C Enterprises, Inc., for applicant's "SNO RAKES®" prominently includes the phrase "The Orange-Headed Original!" Ms. Shutts also testified that on virtually every business day she receives telephone calls from past or prospective customers, and that "at least once a day, on average, customers who phone Applicant inquire to make sure that they are speaking to the company that sells the orange snow removal tool."

Applicant has also submitted a number of letters from customers which make reference to the orange color of the snow removal tool. These include the following comments:

I was so impressed with the SNO-RAKE, I bought one for my wife and bought several more as Christmas gifts—always asking for "the orange one."

In the 12 years we've been carrying Sno Rakes—the orange original one—we've never had a complaint...

May I please have some information on your snow brushes. [A]lso send some prices. Need to order some of the orange snow rakes. Have purchased them [b]efore with a different co. Have my own co. now.

This is to confirm my order For Two Orange Headed Snow Rakes.

Used your orange colored snow brush to clean snow from my car.



Well, it's that time of year again.  
Check out the old Orange snow rake,  
it's just around the corner. I'll give  
you people credit, that orange snow  
rake is just about bullet proof. I do  
need a couple extra this year, and keep  
up the good job. That Orange snow rake  
is Great.

The Examining Attorney has dissected these various  
pieces of evidence, pointing to various cases in which, for  
example, 16 years of use was not found to be conclusive or  
persuasive. However, when the evidence submitted by  
applicant is considered in its entirety, we find that it is  
sufficient to make out a prima facie case that the orange-  
colored head of the snow removal tool has acquired  
distinctiveness as a trademark indicating that source of  
the snow removal hand tool in applicant.

The only evidence of competitive uses of a snow  
removal hand tool is one with a black inner rectangle  
enclosed in a red outer rectangle. The Examining Attorney  
has not submitted evidence with respect to similar hand  
tool products, such as ice scrapers or snow brushes, from  
which we could conclude that there are other users of the  
color orange for such goods. Although the Examining  
Attorney has made of record evidence regarding snow  
shovels, showing that they are available in colors such as  
blue, red, orange, yellow and silver, and NEXIS articles

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referencing orange snow shovels, this material is simply not sufficient to rebut applicant's evidence of acquired distinctiveness.

Decision: The refusals on the grounds of de jure functionality and lack of acquired distinctiveness are reversed.

E. J. Seeherman

L. K. McLeod  
Administrative Trademark Judges  
Trademark Trial and Appeal Board

Simms, Administrative Trademark Judge, concurring:

I agree with the majority but wish to add the following comments. It may well be that a plaintiff in an opposition or cancellation proceeding could demonstrate that orange is a color widely used in connection with snow and ice removal implements, say, for example, orange ice scrapers, orange-bristled snow brushes, orange snow shovels, etc. If it is successfully shown in such a proceeding that the general public has been sufficiently exposed to this color for such closely related goods (say, for example, on the shovel part of several competing snow shovels) so that consumers would be unlikely to view, or to have come to view, the color orange on the head or "business part" of applicant's snow removal tool as an indication of origin, then a different result might well be reached on the question of registrability of applicant's asserted mark. However, because of the limited resources of the Examining Attorney, I do not believe that this has been sufficiently demonstrated in this ex parte case.

R.L. Simms  
Administrative Trademark Judge  
Trademark Trial and Appeal Board